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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	GEN Docket No. 90-314
	ET Docket No. 92-100
	RM-7140, RM-7175, RM-7617, RM-7618,
Amendment of the Commission's	RM-7760, RM-7782, RM-7860, RM-7977,
Rules to Establish New Personal	RM-7978, RM-7979, RM-7980
Communications Services	PP-35 through PP-40
	PP-79 through PP-85
	(FCC 92-333)

COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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November 9, 1992

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In the Matter of

Amendment of the Commission's Rules to Establish New Personal Communications Services

GEN Docket No. 90-314
ET Docket No. 92-100
RM-7140, RM-7175, RM-7617, RM-7618, RM-7760, RM-7782, RM-7860, RM-7977, RM-7978, RM-7979, RM-7980
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COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments addressing the Commission's "Notice of Proposed Rulemaking and Tentative Decision" ("NPRM") as adopted on July 16, 1992, and released on August 14, 1992, in the above-captioned proceeding:

I. INTEREST OF NARUC

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its membership includes governmental bodies engaged in the regulation of carriers and utilities from all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. The NARUC's mission is to improve the quality and effectiveness of public utility regulation in America.

More specifically, NARUC is composed of, inter alia, State and territorial officials charged with the duty of regulating the telecommunications common carriers within their respective borders. As such, they have the obligation to assure the establishment of such telecommunications services and facilities as may be required by the public convenience and necessity, and the furnishing of service at rates that are just and reasonable.

In this proceeding, the FCC has raised as an issue for comment, whether the FCC has and should exercise the authority to preempt state regulation of personal communication services, either directly - by claiming that state regulation would thwart federal objectives and alleging inseverability, or indirectly - by attempting to label such services as private land mobile services under Section 332 of the Communications Act.

Clearly, the prospect of such preemption directly concerns NARUC's State commission membership. The FCC's ultimate determination on this issue, whether it results in a decision that authority exists to preempt or in a decision that the Commission does not possess such authority, will directly impact upon NARUC's members' ability to adhere to their respective mandates to serve the public interest.

The NPRM also raises other issues of interest to NARUC.

II. DISCUSSION

A. As described in the Notice of Inquiry {"NOI"} and the NPRM, the bulk, if not all, PCS services are intrastate.

The FCC describes PCS in the NPRM as a service that includes "advanced forms of cellular telephone service...cordless telephone service, wireless private branch exchange service, and wireless LOCAL area network services." Such services can be used through the existing LOCAL "...public switched network or through alternative LOCAL networks such as cable television systems. PCS can even exist independently of LOCAL wired networks..." NPRM, para. 3, mimeo at 3. Emphasis Added. Indeed, the Commission specifically classifies "wireless LOCAL loop service as a type of PCS..." [NPRM, para. 10, mimeo at 6. Emphasis Added] and suggests that one form of PCS may substitute for current local exchange carrier ("LEC") service at all levels, e.g., be "totally independent of, but permit connection to, the existing wireline public switched network..." NPRM, fn. 16, mimeo at 10.

Perhaps the best description in the NPRM which indicates the character of PCS service is found in paragraph 71. NPRM, mimeo at 30. There the FCC notes that

> "PCS is likely to be both a complement and potentially a competitor to local wireline competitor service. Initially, we expect that PCS primarily will complement LEC-provided wire loops, while over time PCS may become a full-fledged competitor to wireline service."

If this final characterization is correct, i.e., PCS will ultimately become a full-fledged competitor to, and presumably substitute for, current LEC-provided POTS - there can be no doubt, that under the current structure of the Communications Act, except for licensing the spectrum, ALL of a PCS carrier's intrastate operations must be subject to state regulation.

That a PCS provider could use its system to complete or originate toll calls that cross state lines, in the same way the LECs do today for their customers, is irrelevant. As is discussed later, the same legal analysis that the Courts have consistently applied to LEC intrastate operations would of necessity also apply to PCS operations.

To reiterate - all of the characterizations and examples presented by the FCC clearly indicate the inherently local nature of the proposed services.

As discussed below, NARUC does not believe that the PCS service has been defined with enough precision to allow preemption, nor does it appear, when the services are ultimately defined, that preemption will be appropriate. However, NARUC does believe that WHATEVER service ultimately emerges will be both intrastate in character and a "mobile service" within the meaning of Section 153(n) of the Communications Act.

B. PCS is a Section 153(n) "mobile service".

Section 153(n) of the Communications Act defines a "mobile service" as:

> "a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes both one-way and two-way radio communications services."

Clearly, all of the examples and characterizations of PCS mentioned in the NPRM and the preceding NOI fall within this definition.

C. Section 332 determines whether "mobile services" are treated as common carrier or private offerings.

The FCC essentially acknowledges in footnote 19 of the original Notice of Inquiry and in Paragraph 96 of the NPRM, mimeo at 38, that PCSs' status as either common carrier or private land mobile services is controlled by Section 332 of the Communications Act, 47 U.S.C. Section 332 (1990).

It is clear that the bulk of the proposed services qualify as "common carriers" under the traditional common law test of "indifferent service to the public" established in National Association Of Regulatory Utility Commissioners v. FCC ("NARUC I"), 525 F.2d 630 (1976), cert. denied, 425 U.S. 992 (1976).[1]

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[1] See, "Comments of the Public Service Commission of the District of Columbia", filed in GEN Docket No. 90-314 (October 1, 1990) at pages 2 - 3.

However, in 1982, in an effort to end controversy over the standard to be applied to ascertain common carrier or private land mobile status, Congress enacted Section 332(c)(1) to provide a "...clear demarcation between private and common carrier land mobile services." [2] The conference report specifies that the new legislation supersedes the NARUC I test.[3]

According to the conference report "...[t]he basic distinction ...is a functional one, i.e., whether or not a particular entity is engaged functionally in the provision of telephone service or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier." [4] Moreover, private land mobile carriers cannot be "interconnected with common carrier facilities if the licensees...are engaging in the resale of telephone service..." or "...interconnected common carrier services..."[5]

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[2] House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act, 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at pages 2237, 2298 (1983). For a short review of the events which lead up to the enactment of Section 332, see Telocator Network of America v. FCC, 761 F.2d 763 (1985).

[3] Id. at 2299.

[4] Id.

[5] Id.

D. Section 332, requires that PCS, as proposed, be treated as common carrier services.

As proposed, PCS service requires "...provision of telephone service or facilities of a common carrier..." as part of the service offering and, under Section 332's functional test, must receive common carrier status. Even if PCS were to develop in the future which did not require connection to public switched networks, to the extent they offered telephone services similar to those currently offered over the public switched network, providers would be subject to common carrier regulation. [6]

Congress specifically differentiated between private carrier services and common carrier-type service when it enacted Section 332. The Senate sponsors of the legislation pointed out that private land mobile carriers do "not include common carrier operations like the new cellular systems." See, Statement of Mr. Goldwater, for himself, Mr. Packwood, Mr. Schmitt, Mr. Pressler, Mr. Stevens, Mr. Cannon, Mr. Hollings, and Mr. Inouye upon introduction of S. 929, April 8, 1981, 127 Cong. Rec. S3702-03 (daily ed. April 8, 1981).

The conference report makes clear that the purpose behind the interconnection restriction is to "assure that [private carrier]

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[6] Section 152(b) of the Communications Act was amended in 1954 to explicitly clarify that intrastate and local exchange services offered by radio would, like intrastate wire service, be subject to state regulation. S. Rep. No. 1090, 83rd Cong., 2d Sess. (1954); reprinted in, 1954 US Cong. & Ad. News 2133.

frequencies allocated essentially for purposes of providing dispatch services are not significantly used to provide common carrier message service [like cellular]." H.R. Rep. No. 76, 97th Cong., 2d. Sess. 56, reprinted in 1981 U.S.Code Cong. and Ad. News, 2261, 2300. [It would appear that little, if any, of the proposed spectrum allocations in this docket are aimed at traditional dispatch type services.]

As discussed below, in NARUC's view, the Commission's current interpretation of the Section 332 test, as exemplified in, inter alia, the Fleet Call and Mobile Radio New England proceedings, obliterates Congressional intent. Indeed, NARUC recently argued in the still pending MRNE proceedings, that the factual aftermath of the FCC's analysis in the Fleet Call proceeding, presents compelling evidence of the inadequacy of the approach adopted in that case - suggesting, in light of the "changed circumstances", that a petition to reopen the record in that proceeding might be appropriate. Such prospects have become even more apropos in the aftermath of the Commission's recent order lifting the end-user licensing requirements from SMR carriers. Indeed, recently, Commissioner Duggan obliquely acknowledged NARUC's contentions concerning the blurring of distinctions between private and common carriage by suggesting that "given the growing convergence between cellular and private land mobile radio services, I think it may be time to explore the notion of a "Mobile Services Bureau," accommodating not only current services but new ones also, like PCS." See "Duggan Urges Next Administration to Abandon Pretense and Make Good Industrial Policy", Telecommunications Reports, 9-28-92 edition at 4-5.

In this docket, an FCC attempt to label these proposed new PCS services as private offerings would not even have the plausible historical private carrier backdrop of SMR "dispatch-type" service. As NARUC has explained at some length in the pleadings filed in the Fleet Call and other related proceeding, the FCC's current interpretation and application of that test impermissibly blurs the [few remaining] distinctions between private and common carrier status. [7]

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[7] See, 47 U.S.C. Sections 331(c)(3) & 332 (1990) and NARUC's 1991 pleadings addressing the Memorandum Opinion and Order, In re Request of Fleet Call, Inc., 6 FCC Rcd 1533 (2/13/91). See also, NARUC's pleadings "In the Matter of Mobile Radio New England Request for Waiver." TO ASSURE THAT A REVIEWING COURT HAS AN ADEQUATE RECORD TO ALLOW A COMPLETE EXAMINATION OF THE FCC'S "ANALYSIS" OF SECTION 332, NARUC RESPECTFULLY REQUESTS THAT THE RECORD IN THE Fleet Call, Inc ("FCI") AND Mobile Radio New England ("MRNE") PROCEEDINGS, BE INCORPORATED BY REFERENCE INTO THE CURRENT PROCEEDING. NARUC has appended copies of its pleadings in all FCC proceedings tangentially related to the FCI decision.

In examining the FCC's "application" of the Section 332 test in FCI, a decision cited, with little additional discussion, in the NPRM as the lead authority for preemption, it is instructive to consider, e.g., (i) FCI's view of its operations - FCI's October 1991 filed Form S-1 Registration Statement Under the Securities Act of 1933, Registration No. 33-43415, which states that "....[a]s a result of the FCC decision and recent advances in technology, the Company believes it has the opportunity to position itself as the third major provider of mobile telephone services in Los Angeles, San Francisco, New York, Chicago, Dallas and Houston, competing directly with cellular operations..." Emphasis Added. Having a third "cellular" carrier in a market is desirable from NARUC's viewpoint; however, many issues of public policy are raised if states' ability to impose regulations is limited to only two of the market participants; See also the March 16, 1992 "Mobile Insider's FastFax" (BIA publication), stating "Now it can be told...Wall Street sensed it two years ago...The mobile industry knew it because operators could read between the lines..." and quoting FCI's Chairman O'Brien as stating that its network will "go head to head with McCaw [a cellular provider] to serve the same customers"; (ii) the Administration's view of FCI's operations - Remarks of then Assistant Secretary of Commerce for Communications and Information, Janice Obuchowski, at the Donaldson, Lufkin & Jenrette Cellular Conference at the Waldorf-Astoria Hotel on June 20, 1991, noting that "...More controversial, of course, is the FCC's recent decision to allow Fleet Call to offer a cellular-type service

(enhanced SMR) in six large urban markets using bandwidth currently allocated to it for private radio dispatch services." "Spectrum Management Reform: What's Good for America is Good for American Business" Text at page 8., (iii) the business community's view of FCI's, and other SMRs', operations: "Suddenly a license to run a taxi dispatch service is a ticket to get into the cellular business... Fleet Call owns rights to broadcast voice and data over radio frequencies reserved for taxicab dispatchers in New York, Chicago,...As such , it is a potential competitor to the country's high-flying cellular telephone operators...Lining up behind Fleet Call with their eyes on the public equity trough are other dispatchers. "The taxicab as phone company", Gary Slutsker, Forbes, 1/6/92.

FCI's fully interconnected systems, as many of the proposed PCS experimental offerings, "handoff a user's conversation as the user passes from one cell to another in a manner that is functionally indistinguishable from true "common carrier" cellular service. Even before the FCC's FCI decision, when asked how FCI's system could differ from true cellular, FCI's Vice President Jack Markell was quoted in an industry publication as responding "..[t]here are four major differences: (1) ESMR will not have nationwide roaming, (2) ESMR will have less spectrum, (3) ESMR will have user licensing, cellular does not, and (4) ESMR will offer dispatch service, cellular does not."Fleet Call to Invest 500 Million in New SMR System, NABER's SMR Letter, May 1990 at 2. In making any rational sort of "functional" analysis, these distinctions are of little if any significance - such systems are the functional equivalent of cellular service - indeed, as the remarks quoted above and in earlier filings in the FCI Proceeding demonstrate, not only do industry, Wall Street, and Administration officials seem to agree about the functional equivalency of these new enhanced services, but FCI itself is obviously pushing and relying on that "cellular" common carrier perception as the basis for its marketing and financing plans. The amount of spectrum used and the fact that ESMR can offer dispatch service are of no interest or consequence to a user looking for mobile telephone service. The FCC has recently eliminated the end-user licensing requirement, a process which, even before the change, was only a simple, perfunctory process allowing the end user to begin using the service the day he subscribed, without awaiting issuance of the license. See 47 C.F.R. Section 90.657 (1991). The only distinction of any, albeit minimum, significance is the supposed lack of nationwide roaming. Not surprisingly, in February 1992, FCI announced it had "joined the Digital Mobile Network Roaming Consortium... formed...by a group of major...SMR..operators who intend to install advanced digital radio systems and offer compatible mobile communications services on a nationwide basis." The PCS offerings described in this proceeding lack even the minimal historical distinctions applicable to ESMR service discussed in those proceedings.

Pending judicial review, such FCC action would remove, in spite of the clear dictates and legislative history of both Sections 332 and 152(b) of the Communications Act, the state discretion to ensure that such new offerings provide the best, most efficient service to the public under reasonable rates, terms and conditions. Thus, this order not only raises serious questions under the Communications Act but also overlooks the well-established interests of the states in retaining jurisdiction over such services.

Presumably, in enacting Section 332, Congress intended to place some limits on the FCC's ability to create private carrier services. NARUC believes, inter alia, that limitation includes a requirement that spectrum allocated for "dispatch-type services" not be used to provide an interconnected telephone service that is functionally equivalent to common carrier cellular service. If the current interpretation of Section 332 is ultimately accepted in this docket, it would appear that the FCC could define any service as private through an appropriate manipulation of accounting regulations to "assure" that interconnected service "is not being resold" for a profit. Heretofore, the FCC has failed to provide any meaningful analysis of Section 332. If the Section 332 "interpretation" is extended to this docket, the FCC will have determined that any "mobile service" can be interconnected even if absolutely no traditional "dispatch" type service is, in fact, being provided or even proposed, and even if the sole reason the service is viable is that it is acting as a substitute and competitor for services that no one disputes are "common" [and, incidentally, also intrastate], i.e., current cellular service and wireline POTS.

E. States may regulate the rates, terms and geographic service territories of such intrastate common carriers, if they deem it necessary to do so, and the FCC may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over such common carriers.

It is clear from the above discussion that the PCS services discussed must be treated as common carriers under the provisions of the Communications Act. The Commission acknowledged in the NOI, that "...[i]f these services are considered to be, or classified as, radio common carrier telephone exchange services, then the states, under Section 2(b) of the Act, may impose entry and rate regulations upon intrastate operations." Notice of Inquiry, mimeo at 13, footnote 19. This is in accord with Congress' view of Section 332(c)(3) of the Communications Act, as expressed in the Joint House and Senate Conference Report issued with the 1982 amendments of that legislation.

In that report, the conferees note that, although the FCC maintains its exclusive radio licensing authority, "..states retain full jurisdiction to engage in the economic regulation of common carrier stations (i.e., regulation of entry, rates and practices) consistent with Sections 2(b) and 221(b) of the Communications Act of 1934 (47 U.S.C. 2(b), 221(b) (1976)) to the extent they deem it necessary in the public interest to do so." [8]

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[8] House Conference Report No. 97-765, Joint Explanatory Statement of the Committee of Conference on P.L. 97-259, The Communications Amendments Act, 97th Cong., 2nd Sess. 54, reprinted in, 3 U.S. Code Cong. & Ad.News '82 Bd.Vol., at page 2300 (1983). See also, NARUC v. FCC, 880 F.2d 422, 428 (D.C.Cir. 1989); California v. FCC, 905 F.2d 1217 (9th Cir. 1990).

Moreover, the report goes on to note that "...the Commission may not use its licensing powers to circumvent limitations in its economic regulatory jurisdiction over common carrier station.{Emphasis Added}"[9]

F. Because Section 152(b) "fences off" from FCC regulation such intrastate services, the FCC cannot preempt State regulation of such services unless the services are inseverable and State's actions negates the FCC's exercise of its authority over interstate service.

In the NPRM, the Commission asks..

> "...for comment on whether, and to what degree, we should preempt state and local regulation of PCS if we classify PCS as a common carrier service. In this connection, we ask for comment on whether the intrastate components of PCS could be severed technically or otherwise from the interstate components for regulatory purposes and, if not, whether state or local regulation of the intrastate components would thwart or impede the federal policies underlying the interstate provision of PCS." NPRM, Paragraph 97, mimeo at 38

The short answer to the questions posed are simply - no, yes, and no, respectively. To preempt state authority over intrastate telecommunications services, the FCC must address Section 152(b). That section expressly bars federal regulation of intrastate communication services, and denies federal jurisdiction over the "practices", "facilities" and "regulations" which govern the conduct of carriers offering such services.

Thus, in the seminal Supreme Court Case interpreting this section, Louisiana Public Service Commission v. FCC, 476 US 355; 106 S Ct 189 (1986), the Supreme Court construed the scope of Section 152(b) to deny federal authority over intrastate matters under the Communications Act.

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[9] Id.

In that case the FCC argued that Section 152(b) did not bar federal authority to preempt state depreciation practices which were inconsistent with or otherwise frustrated federal policies. The FCC instead claimed that Section 152(b) controls only where state regulation is "confined to intrastate matters which are 'separable from and do not substantially affect' interstate communication." Louisiana, 106 S Ct at 1901. Because a telephone carrier's depreciable assets are used interchangeably for both interstate and intrastate service, the FCC concluded that preemption was valid under the Act in order to effectuate federal policies.

However, the Supreme Court flatly rejected the FCC's construction of the Act, and held that this "misrepresents the statutory scheme and the basis and test for preemption." Id. Emphasizing that Congress created a dual system of regulation of communication services, the court held that Section 152(b) expressly denies federal jurisdiction over intrastate service. Id. at 1899; Cf., California v FCC, 798 F 2d 1515 (D.C. Cir, 1986). The court's construction of Section 152(b) is written in the broadest terms possible:

> "By its terms, this provision fences off from FCC reach or regulation intrastate matters' - indeed, including matters in connection with' intrastate service." Louisiana, 106 S Ct at 1899; California v FCC, 798 F 2d at 1519.

Throughout its opinion the U. S. Supreme Court repeatedly emphasized the sweeping language of Section 152(b) that "nothing ... shall... give..." the FCC jurisdiction over intrastate communication service. Louisiana, 106 S Ct at 1899, 1902 n.5, 1903 (emphasis in original).

Additionally, Section 152(b) not only "impose[s] jurisdictional limits on the power of a federal agency", but it also "provides its own rule of statutory construction" for interpreting the Act. Congressional reservation of state authority over local matters recognizes two fundamental premises. First, local markets for particular communications services, and telephone company capabilities and business strategies to serve local markets, vary from region to region. Second, state regulators are in the best position to address these localized concerns.

In California Public Service Commission v. FCC, an appeals court conducted a similar analysis of FCC's authority to preempt State regulation of enhanced services based on an FCC determination that enhanced services were non-common carrier services and therefore beyond the scope of State regulatory jurisdiction under Section 152(b). That Court also found that Section 152(b) fenced off from FCC regulation intrastate telecommunications services provided "in connection with" communications services. The Court stated that it did not matter if the services did not constitute common carrier services so long as the services were provided by a common carrier in connection with telephone services. California, at 1239-42.

Also in California, the FCC attempted to justify its preemption of State ESP regulation by stating that State regulation, in the form of structural safeguards or inconsistent non-structural safeguards, could not coexist with the FCC's Computer III regulatory scheme.

The FCC's argument was based upon the so-called "impossibility exception" to Section 2(b) which derived from the Supreme Court's decision in **Louisiana PSC v. FCC**, 476 U.S. 355, 375 n.4 (1986).

In rejecting the FCC's arguments the Court interpreted that exception as stating that, "the only limit . . . on a state's exercise of [its 2(b)] authority over intrastate telephone service occurs when the state's exercise of that authority negates the exercise by the FCC of its own lawful authority over interstate communication. **NARUC III**, 880 F.2d at 429." California, at 1243.

Moreover, as California makes clear, even where such conditions are proven by the FCC, a preemption order is upheld only where the FCC affirmatively demonstrates that every aspect of its preemption order is narrowly tailored to preempt only the aspects of the particular state enactments that necessarily thwarts or impedes the FCC's valid regulation of interstate telecommunications services.

In sum, the Louisiana decision, even when given the most expansive construction supporting FCC authority to preempt, only permits narrowly-tailored preemptive federal policy where (1) state regulation totally negates a valid federal policy and (2) it is not possible to separate the interstate and intrastate components of the federal regulation. Id. at 375.

G. The current record will not support FCC preemption of State regulation of intrastate PCS service offerings.

1. Preemption, even if appropriate, is premature, pending more accurate service descriptions.

The potential preemptive reach suggested in the NPRM is far from "narrowly tailored". Indeed, the NPRM submits various laundry lists of types of PCS services and suggests that

> "PCS is evolving and it is likely that a variety of services will be offered under the rubric of PCS, some of which may constitute private land mobile services and some of which may constitute common carrier..services. We ask for comment on this possibility, including whether PCS licensees should be eligible to provide service either on a common carrier or private basis." NPRM, para. 98, mimeo at 39.

This passage, which is typical of the NPRM text, illustrates the problems with the FCC's approach. It rather broadly suggests that PCS is "evolving" and will constitute a "variety" of services. NARUC respectfully suggests that the NPRM appears to place the burden on States to show why the FCC should not preempt their regulation of intrastate PCS services - without providing a sufficiently detailed description of the services involved. To address the FCC's questions, states are placed in the untenable position of defining every conceivable form of PCS, hypothecating services characteristics, and demonstrating why such services do not drastically impede federal policy.

However, as the California decision makes clear, the burden rests with the Commission to justify any preemptive activity. In rejecting the FCC's arguments in that case, the Court stated:

> "[T]he FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals." California, at 1243.

In this case, NARUC submits that the FCC has not defined the services sufficiently or, as discussed below, articulated a sufficient rationale concerning the possible "impeding" effects of state regulation.

2. Although the NPRM fails to articulate any potential deleterious effects of state regulation, NARUC believes that the Communications Act suggests that State input in balancing the Federal goals identified in the NPRM is required to serve the public interest.

Predictably, the NPRM, in typical fashion, nowhere discusses whether or how general state regulation of PCS service would impede valid federal goals. Without additional guidance from the FCC, it is difficult to generate anything but a very general response.

However, the NPRM sets as goals the balancing of four values, i.e., universality, speed of deployment, diversity of services, and competitive delivery. NPRM, para. 6, mimeo at 4. Nowhere does the FCC discuss the possible deleterious effects of state commission's have the authority to regulate PCS. Indeed the only "discussion" of the evils of regulation in the NPRM generally refer to cellular service, which is subject to state jurisdiction, and the FCC's [not State's] own procedures. See, NPRM, para. 7, mimeo at 4, where the FCC states

> "the years-long process culminating in cellular's birth is one of the prime examples of how the Commission's regulatory processes can be manipulated to delay the initiation of a new service." {Emphasis Added}

NARUC believes that both the structure and history of the Communications Act requires state involvement in balancing issues of universality, speed of deployment, diversity of service and competitive delivery. However, a complete and detailed exposition of the beneficial effects of the existence of state regulatory authority over intrastate services in the abstract would only burden the record in this proceeding.

Accordingly, NARUC will await some suggestion from the FCC on how state authority might impede PCS deployment. Certainly, a bare citation to cellular service and the FCC's own policies does not constitute either an adequate record to justify preemption or the necessary fair opportunity for comment required by the Administrative Procedures Act. [Indeed - in one of the NPRM's few detailed discussions of state commission authority - as far as the interconnection issue is concerned, the FCC has already implicitly determined, at least in the near term, that state regulation of rates for interconnection of PCS will not impede federal goals. See NPRM, para. 103, mimeo at 40-41.]

3. Whatever PCS services ultimately develop, NARUC believes that, like current cellular and LEC-provide POTS, the minor interstate components will be severable.

With cellular, most other services cited in the NPRM as potential PCS, and the proposed "complement" and/or "competitor" to PCS, i.e., LEC-provided POTS, the FCC has never experienced any real difficulty in severing the interstate aspects. Particularly, with the rate the technology is evolving, NARUC believes all future PCS services will be "severable"; thus far, the record herein does not show the contrary.

IV. CONCLUSION

NARUC believes that the Communications Act requires that PCS service providers be regulated as common carriers and that effective implementation of such services requires imposition of the conditions described above. We support the Commission's initiative in pursuing development and implementation of personal communication services, and respectfully request that the Commission carefully examine and give effect to these comments.

Respectfully submitted,

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In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services

GEN Docket No. 90-314

APPENDICES

APPENDIX A - THE FLEET CALL PROCEEDING

In the Matter of
Fleet Call Inc. Application for Authority
to Assign SMR Licenses and Waiver of Certain
Private Radio Service Rules

File No. LMK-90036

A-1	NARUC'S	APRIL 15, 1991 PETITION FOR RECONSIDERATION
A-2	NARUC'S	MAY 10, 1991 REPLY TO OPPOSITIONS
A-3	NARUC'S	MAY 29, 1991 ERRATA TO REPLY APPENDIX B